DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220752.2 DATE: March 28, 1986

MATTER OF: Cable Antenna Systems--Reconsideration

DIGEST:

Where an agency properly determined that in order to establish a second source for cable television services it was necessary to exclude the incumbent cable operator from the competition, the incumbent is not an interested party to protest alleged defects in the solicitation.

Cable Antenna Systems (CAS) requests reconsideration of our decision, Cable Antenna Systems, B-220752, Feb. 18, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ ____, in which we dismissed CAS's protest of the issuance by Vandenberg Air Force Base, California, of a request for proposals for a nonexclusive franchise to provide cable television services to subscribers at the base. We deny the request for reconsideration.

We dismissed the prior protest for two reasons. First, the principal complaint raised by CAS was that the agency had violated its rights as an incumbent cable operator under the Cable Communications Policy Act of 1984, 47 U.S.C.A. § 521, et seq. (West Supp. 1985). We noted that the act expressly provides for judicial review of alleged failures of a franchising authority to act in accordance with the franchise renewal provisions of the act and, believing the provision for judicial review to be exclusive of any review by this Office, we declined to consider any alleged Cable Act violations. CAS does not request reconsideration of this part of our decision.

We also declined to consider the allegations by CAS that the RFP was defective because it did not contain evaluation criteria and that the agency improperly had attempted to prevent CAS from submitting a proposal. We held that CAS was not the proper party to pursue alleged solicitation defects because CAS would not be eligible for

award under the solicitation in any event. The purpose of the solicitation was to select a second cable operator at Vandenberg in order to promote competition between operators for the benefit of subscribers. Since CAS already had a franchise, with the right under the Cable Act to seek renewal, we said that the exclusion of CAS from competing under the solicitation was necessary in order to achieve the objective of awarding a franchise to a second operator. We noted in a footnote that if CAS's franchise were not renewed, the Air force intended to issue another solicitation under which CAS would be eligible to compete.

In requesting reconsideration, CAS says it is clearly an interested party to contest any eligibility requirement that prevents it from participating in the procurement. CAS argues that it was in fact a potential offeror because the solicitation failed to state that CAS would not be eligible to compete and because CAS's franchise had expired in August 1985. CAS also argues that it has been constructively debarred as a result of the agency's actions.

We agree with CAS that it is an interested party for purposes of contesting its exclusion fom the competition. We effectively addressed this issue in our prior decision, however, when we acknowledged the necessity of excluding CAS from the competition in order to create a second source for cable services. We conceded that the solicitation should have advised all potential offerors that the incumbent cable operator would not be eligible for award of the second franchise but, under the circumstances, we could find no reason to object to the exclusion. We find no more reason to do so now.

With respect to other alleged solicitation defects, even if the agency were to redraft the solicitation to correct what CAS perceives as deficiencies, CAS would remain ineligible for the second-source franchise award as long as it maintains its status as an incumbent franchisee. Thus, since CAS would not be eligible for award even under a reissued solicitation, CAS is not an interested party to pursue these other issues. Prospect Associates, Ltd.--Reconsideration, B-218602.2, Aug. 23, 1985, 85-2 CPD ¶ 218.

The protester's argument that it was eligible for award because it was not a "franchisee" at the time the agency issued the contested solicitation is without merit. The record in this case indicates that the agency had issued short-term extensions of the franchise that otherwise would have expired in August. The agency said that these extensions did not operate to "renew" the CAS franchise, and CAS characterizes the extensions as "temporary authorizations." Regardless of the term used to describe the arrangement, however, it is clear that CAS was an incumbent cable operator at the time the agency issued the solicitation and that its right to continue to provide cable services was being considered by the agency under the procedures applicable to incumbents, independent of the competitive solicitation. It is this circumstance that justifies the agency's determination to consider the firm ineligible to compete for the second franchise, not whether CAS technically may have ceased to become a "franchisee."

Finally, the argument by CAS that it has been constructively debarred is also meritless. CAS continues to provide cable services, is being considered for renewal of its cable franchise under appropriate procedures and, presumably, will have an opportunity to compete for a franchise if its current franchise is not renewed.

The request for reconsideration is denied.

Harry R. Van Cleve
General Counsel